

**TESTIMONY OF ANN E. GOODE**

**DIRECTOR**

**OFFICE OF CIVIL RIGHTS**

**U.S. ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE**

**SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS**

**OF THE**

**COMMITTEE ON COMMERCE**

**U.S. HOUSE OF REPRESENTATIVES**

**August 6, 1998**

Mr. Chairman, Members of the Subcommittee, thank you for inviting me to discuss the Environmental Protection Agency's (EPA's) *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*.

Thirty-four years ago, on July 2, 1964, Congress passed the Civil Rights Act of 1964 -- the most comprehensive piece of civil rights legislation since Reconstruction. Title VI of the Civil Rights Act prohibits discrimination in all federally funded programs and activities. Specifically, Title VI provides that:

*No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*

The purpose of Title VI was to establish a national policy to ensure that federal financial assistance is not used to subsidize illegal discrimination. Although Title VI itself prohibits intentional discrimination, the Supreme Court has ruled that Title VI authorizes federal agencies, including EPA, to adopt implementing regulations that prohibit discriminatory *effects*. Facially-

neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative.<sup>1</sup>

To prevent recipients from using federal funds to subsidize racial discrimination, Congress authorized and directed federal agencies to implement and enforce Title VI in their federally funded programs. EPA exercised this authority, in coordination with the Department of Justice (DOJ), by promulgating Title VI regulations in 1973.<sup>2</sup> EPA subsequently amended its regulations in 1984 to consolidate EPA's non-discrimination responsibilities under Title VI, Section 504 of the Rehabilitation Act of 1973, and Section 13 of the Federal Water Pollution Control Amendments of 1972.<sup>3</sup>

Courts have interpreted Title VI to prohibit a broad range of discriminatory activities, including denial of services; differences in the quality, quantity or manner of services; different standards for participation; discrimination in any activity conducted in a facility built with federal funds; and discriminatory employment practices if the primary purpose of the program is to provide employment.

EPA's Title VI regulations allow citizens to file administrative complaints with EPA that allege discrimination under programs or activities receiving EPA funding.<sup>4</sup> Many states and local governments receive EPA assistance in the form of annual grants to fund their environmental permitting programs. As a condition of receiving these funds, state and local agencies agree to comply with Title VI and EPA's implementing regulations.

Since 1993, when EPA received its first Title VI complaint, we have received approximately 50 Title VI complaints which allege a theory of disproportionate adverse impact from environmental permitting. EPA has accepted 15 complaints and has a responsibility to investigate these complaints to ensure our funding is not being spent to in a manner that results in discriminatory effects. In addition, in 1996, the U.S. Commission on Civil Rights, a non-partisan body responsible for overseeing the implementation of this nation's civil rights laws, recognized the growing application of Title VI to environmental permitting and recommended that EPA issue guidelines consistent with those called for by the DOJ coordination regulations.<sup>5</sup> Specifically, the Commission called for guidelines that "include detailed complaint procedures."<sup>6</sup> Moreover, EPA

---

<sup>1</sup> 40 C.F.R. § 7.35(b-c) (1998); *See*, Department of Justice, Attorney General's Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, *The Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964* (July 14, 1994).

<sup>2</sup> 38 Fed. Reg. 17968 (July 5, 1973).

<sup>3</sup> 49 Fed. Reg. 1659 (Jan 12, 1984); 40 C.F.R. Part 7 (1998).

<sup>4</sup> 40 C.F.R. § 7.120 (1998).

<sup>5</sup> 28 C.F.R. § 42.404 (1998).

<sup>6</sup> *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, A Report of the U.S. Commission on Civil Rights (June 1996), 428.

has received increasing requests for assistance by EPA recipients on how they can ensure compliance with Title VI and EPA's implementing regulations. As a first step in addressing this growing need for guidance in this area, EPA issued its internal *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* in February 1998.

### Interim Guidance

The Interim Guidance is designed to provide a framework for the Office of Civil Rights to process administrative complaints filed under Title VI of the Civil Rights Act of 1964 -- namely those complaints that allege discrimination based on race, color, or national origin resulting from the issuance of environmental permits issued by EPA recipients.

The process outlined in the Interim Guidance is based on EPA's Title VI implementing regulations<sup>7</sup> and Title VI case law establishing the disparate impact standard of discrimination. EPA's Title VI regulations, which were reviewed and approved by DOJ, are based on model DOJ regulations and are similar to those of other federal agencies. EPA's regulations and the Interim Guidance require that:

- the complaint be in writing and describe the alleged discriminatory acts which violate Title VI<sup>8</sup>;
- the complaint be filed within 180 days of the alleged discriminatory act<sup>9</sup>;
- EPA notify the complainant and recipient of EPA financial assistance of the receipt of complaint<sup>10</sup>;
- if EPA accepts a complaint for investigation, it will give the recipient of EPA financial assistance an opportunity to rebut or deny the allegations made in the complaint<sup>11</sup>;
- EPA make preliminary and formal findings of noncompliance when necessary.<sup>12</sup>

If a complaint satisfies the basic jurisdictional requirements, OCR must conduct an investigation to determine whether a recipient of EPA financial assistance is in compliance with the Title VI regulations. The majority of the complaints EPA has received to date allege that a discriminatory effect has resulted from either the issuance of a particular permit or a series of permitting actions. The Interim Guidance provides a more detailed framework, consistent with EPA's regulations, to investigate and resolve these complaints.

---

<sup>7</sup> 40 C.F.R. Part 7 (1998).

<sup>8</sup> 40 C.F.R. § 7.120(b)(1) (1998).

<sup>9</sup> 40 C.F.R. § 7.120(b)(2) (1998).

<sup>10</sup> 40 C.F.R. § 7.120(c) (1998).

<sup>11</sup> 40 C.F.R. § 7.120(d)(1)(ii) (1998).

<sup>12</sup> 40 C.F.R. § 7.115(c)(1)(ii) & (d) (1998).

In conducting an investigation, EPA must, as a preliminary matter, ask and answer two basic questions: (1) are there adverse effects and (2) is a segment of the population defined by race, color, or national origin bearing a disproportionate share of those adverse effects? The Interim Guidance outlines a common sense framework to answer these two questions:

- 1) identify the adverse effects considered by the recipient under its permitting program;
- 2) identify the affected population;
- 3) determine the demographics of the population;
- 4) identify the permitted facilities and other permitted facilities to be included in the analysis;
- 5) conduct a disparate impact analysis which is likely to involve comparing the racial or ethnic characteristics of the affected population and the non-affected populations;
- 6) determine the significance of the disparity, if any.

If the answer to these two basic questions is “yes,” the Interim Guidance calls for EPA to make an initial finding of a disparate adverse impact. I want to emphasize that this initial finding is not a formal finding of a violation of Title VI. Instead, it provides additional opportunity for EPA to verify and share the information gathered during the investigation with the parties. The initial finding may also provide the basis for meaningful dialogue between the recipient and the complainant, and ultimately a satisfactory resolution for EPA, the recipient, and the complainant.

Furthermore, both the Interim Guidance and EPA’s Title VI regulations call for EPA to pursue informal resolution of administrative complaints whenever possible. Throughout the process, EPA will encourage and facilitate informal resolution with recipients, complainants, and affected stakeholders.

### Stakeholder Concerns

EPA is aware of a number of concerns being raised about the Interim Guidance and its perceived impacts. These concerns have been relayed to EPA during meetings with various stakeholders and through the comments EPA received on the Interim Guidance from state and local governments, academic institutions, industry associations, grass roots organizations, and other parties. The issues identified include the need for:

- substantial involvement from stakeholders;
- clear definitions of terms like “disparate impact” and “affected community;”
- addressing concerns that the Interim Guidance will not hinder or halt economic re-development in the nation’s urban areas and exacerbate urban sprawl;
- technical assistance to recipients; and
- peer reviewed methodologies for the assessment of disparate impact and harm based on sound science.

### Stakeholder Involvement and Clarity

The Interim Guidance was put in place to provide clear touchstones to process the growing backlog of Title VI complaints, while concurrently soliciting public comment. It has provided a starting point to open up dialogue with community leaders, state and local officials, and business interests. We are listening to stakeholders, trying to address substantive concerns raised, and will work with them through a variety of mechanisms to assure greater input into the final guidance -- to shape a Title VI policy that works for everyone. EPA wants to develop concrete, constructive ways to protect the environment and public health, revitalize urban centers across the country, and protect the basic rights of all citizens.

Administrator Browner, Deputy Administrator Hansen, other EPA senior managers, and I have met with concerned stakeholders -- providing opportunities for meaningful discourse and exchange. A meaningful dialogue is a primary purpose of our Title VI Implementation Advisory Committee (or Title VI Committee) -- 26 representatives from state, tribal, and local governments, industry, academia, non-governmental organizations, and community groups working to develop recommendations on how state environmental agencies can address Title VI concerns up-front in the permitting process.

Administrator Browner established the Title VI Committee in March 1998 and has charged the Committee to "think outside the box" in developing their recommendations, which will be submitted to EPA in December 1998. Recognizing the importance of terms such as disparate impact and affected population, the Title VI Committee is examining how they have been used in civil rights law and could be used in the environmental permitting context. The Committee has held two meetings and will meet twice more before concluding its work.

EPA's Office of Civil Rights has also received more than 115 comments from the public on the Interim Guidance. We are currently reviewing those comments and will consider them, as well as the recommendations of the Title VI Committee, before finalizing the Interim Guidance.

#### Title VI and Economic Re-Development

In our discussions with concerned stakeholders, EPA senior managers have heard concerns expressed about our developing Title VI program -- namely that it will deter economic redevelopment, particularly the much-needed revitalization of and reinvestment in urban centers across the nation. We know that involving communities up front and every step of the way -- as we do in our Brownfields activities -- works. The Brownfields program has given many urban centers hope and promise of new jobs, new resources, and new resolve. Across the nation, in partnership with state and local government and communities, we have leveraged nearly \$1 billion in private funds for redevelopment of Brownfields -- creating more than 2,000 jobs in the process.

Although none of the 58 Title VI complaints filed with my office involves a Brownfields project or has held up redevelopment in our cities, EPA is mindful of the concerns raised. For example, in Detroit last month, the Administrator committed to conduct several case studies at Brownfields sites to look at issues and implications of Title VI for the Brownfields program.

Ensuring the basic rights of every citizen is not about stopping development, but about responsible development. The Administrator and I are convinced that economic development can continue while we protect the rights of all our citizens to a safe and healthy environment.

#### Technical Assistance to Recipients

EPA's Office of Environmental Justice has established the State and Tribal Environmental Justice (STEJ) Grants program to provide assistance to states and tribes as they work to achieve environmental justice and ensure their programs comply with Title VI. EPA has set aside a total of \$500,000, with a maximum of \$100,000 per grant. EPA expects to award the grants in the near future.

Additionally, in response to concerns raised by local government officials, the Administrator recently committed to the following:

- (1) create a mayors' desk in EPA's intergovernmental office with one phone number and one point of contact;
- (2) establish a "one-stop shopping" information resource center so that mayors' representatives can have one source in EPA that is aware of all financial assistance available to cities; and
- (3) work with U.S. Conference of Mayors staff to explore options regarding the establishment of a mayors/cities advisory committee. These commitments are designed to provide support to local governments and to continue a dialogue with the mayors on important policy issues.

### Peer Review

In the course of one of our investigations, EPA has developed proposed methodologies to assess disparate impact through the measurement of harm and the identification of the affected community. Those methodologies were recently submitted to EPA's Science Advisory Board (or SAB) for peer review. The SAB will meet to discuss the proposed methodologies in early September. The meeting is open to the public and provides for submission of oral or written comments by the public for SAB consideration.

### Conclusion

Mr. Chairman, thank you for this opportunity to talk with you and the Subcommittee regarding the Title VI Interim Guidance. We welcome any recommendations that this Subcommittee can make to assist EPA in its efforts to ensure environmental and public health protections while also protecting basic rights of citizens. Thank you.